

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF SHORELINE
SUBSTANTIAL DEVELOPMENT PERMITS
GRANTED BY DOUGLAS COUNTY AND THE
CITY OF EAST WENATCHEE TO
WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION,

WASHINGTON ENVIRONMENTAL COUNCIL,
SAVE THE RIVERFRONT COMMITTEE,
FRIENDS OF THE COLUMBIA, CLIFFORD
and MARY BATES, MICHAEL W.
GENDLER, ROBERT W. JOHNSON, and
STATE OF WASHINGTON DEPARTMENT
OF ECOLOGY,

Appellants,

v.

DOUGLAS COUNTY, CITY OF EAST
WENATCHEE, and STATE OF WASHINGTON
DEPARTMENT OF TRANSPORTATION,

Respondents.

SHB NOs. 86-34, 86-36
& 86-39

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the request for review of shoreline substantial development permits granted by Douglas County and the City of East Wenatchee to the Washington State Department of Transportation for construction of SR 2/SR 28, came on for hearing before the Shorelines Hearings Board; Lawrence J. Faulk, Chairman, Wick Dufford, Judith A. Bendor, Nancy Burnett and Annette S. McGee, Members. Dennis J. McLerran, Member, read the evidence and transcript. Administrative Appeals Judge William A. Harrison presided.

1 The evidentiary hearing was conducted in Wenatchee, Washington
2 from March 2 through 6, 1987. The Board viewed the site during that
3 term of the proceeding. The hearing was thereafter conducted in
4 Lacey, Washington from March 9 through 20, 1987. In all, 15 days were
5 devoted to the evidentiary hearing.

6 Appellants Washington Environmental Council, et al., were
7 represented by Michael W. Gendler, Attorney at Law. Appellant Robert
8 W. Johnson appeared and represented himself. Appellant Washington
9 State Department of Ecology did not appear. Respondent Washington
10 State Department of Transportation was represented by Charles F.
11 Secrest, Susan Jensen and Ronald Wise, Assistant Attorneys General.
12 Respondent Douglas County was represented by Judith A. McCauley,
13 Prosecutor. Respondent City of East Wenatchee did not appear. Gene
14 Barker and Associates recorded the proceeding.

15 Having considered the testimony, exhibits and arguments of
16 counsel, and being fully advised, the Shorelines Hearings Board makes
17 these

18 FINDINGS OF FACT

19 I

20 This matter arises on the Columbia River shoreline near East
21 Wenatchee, and concerns a proposal for a new segment of state highway.

22 II

23 East Wenatchee and Wenatchee lie facing one another on opposite
2
2

24 FINAL FINDINGS OF FACT,
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27

1 sides of the Columbia. Rock Island Dam, which is downstream of these
2 cities, impounds the Columbia into the "Rock Island Pool" at this
3 location. Thus the Columbia takes on the more quiescent appearance of
4 a lake between these cities. The Rock Island Pool terminates upstream
5 of the cities at the Rocky Reach Dam.

6 III

7 State Route (SR) 2 runs eastward from the Seattle area through
8 Stevens Pass to the Wenatchee area. It then crosses the Columbia's
9 Rock Island Pool, via Olds Station Bridge, and enters Douglas County
10 in the East Wenatchee area. At present, SR 2 then intersects the
11 "Sunset Highway" at roughly right angles. From this intersection, SR
12 2 continues north on Sunset Highway and then eastward to Orondo,
13 Waterville, Coulee City, Wilbur, Creston, Davenport, Reardan and
14 Spokane. From the same intersection of SR 2 and Sunset Highway, SR 28
15 goes south on Sunset Highway and eastward to Quincy, Ephrata, Soap
16 Lake, Odessa, Harrington and then Davenport where it rejoins SR 2.

17 On the western shore of Rock Island Pool, there is a two lane
18 highway, SR 97, running north from Olds Station Bridge.

19 IV

20 Sunset Highway is a two lane state highway. It is situated well
21 inland from the Columbia on a wide expanse of level ground which
22 borders the river, known generally as "Baker Flats". Baker Flats is
23 developed with orchards north of Olds Station Bridge. South of Olds
24

1 Station Bridge there are, along with orchards, residential
2 sub-divisions and commercial businesses which make up East Wenatchee
3 or its immediate environs.

4 V

5 The commercial and residential development along Sunset Highway in
6 and near East Wenatchee has developed to a density which occasionally
7 causes "stop and go" driving conditions due to traffic congestion.
8 There is also a concern for safety on Sunset Highway. At present the
9 statistical accident rate for Sunset Highway is close to the statewide
10 average for comparable highways.

11 VI

12 Some of the objectives of respondent, Department of Transportation
13 (DOT) are to serve longer distance traffic, and to reduce peak traffic
14 congestion and improve safety of travel in the SR 2/28 corridor
15 between Rocky Reach Dam and the East Wenatchee vicinity.

16 VII

17 In its final environmental impact statement published in July,
18 1985, DOT set forth six alternative means to achieve its goal of
19 reducing congestion and improving safety on Sunset Highway.

20 VIII

21 The preferred alternative of DOT is rooted in the fact that 30
22 years ago, in 1957, it acquired the bulk of the Columbia River's
23 eastern shoreline from Rocky Reach Dam south to the midst of East
24

1 Wenatchee. The intent of DOT from 1957 to 1983, was to build a four
2 lane state highway along that 8 1/2 mile shoreline. The present DOT
3 proposal, or preferred alternative, is for a two lane state highway
4 along that same shoreline. It would run parallel to Sunset Highway
5 which would then become a county road.

6 IX

7 The 8 1/2 miles of Columbia River shoreline held by DOT for the
8 past 30 years has remained largely in its natural state. During those
9 decades it has seen regular use by the public for walking, wildlife
10 observation, fishing, boat launching, off road vehicle use and similar
11 forms of recreation. Parts of the shoreline are "low bank", allowing
12 the public to get down to the water. There are no fewer than 15
13 informal access points to approach the Columbia on this publicly held
14 shoreline. Portions of the shoreline have also been leased by DOT for
15 orchard use. This shoreline is visible from the City of Wenatchee,
16 particularly from its new waterfront park which is the site of summer
17 activities which attract thousands of people. Within this shoreline
18 there is a documented archaeological site which was occupied by a
19 prehistoric community. Within this shoreline there are wetland areas,
20 including Cox's Pond and Porter's Pond, which are home to wildlife
21 that includes bald eagles. There are as many as three wintering bald
22 eagles in the vicinity of the shoreline, although this pool of the
23 Columbia is little used by eagles compared to other pools on the
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1 river. Canada geese and other birds, including waterfowl, and small
2 mammals inhabit the DOT shoreline. An atmosphere of open space
3 prevails throughout the shoreline in question, despite its location on
4 a city's doorstep.

5 X

6 The six alternative means which DOT has set forth to reduce
7 congestion and improve safety on Sunset Highway are set out in the
8 following findings.

9 XI

10 Alternative 1. The DOT preferred alternative is to locate a new,
11 two lane, state highway segment down the Columbia River shoreline from
12 Rocky Reach Dam to East Wenatchee. The proposed highway would be
13 fenced for its entire length on its upland border. The fence would be
14 chain link, six feet high in the southern half of the project and four
15 feet high in the northern half. For that reason pedestrian access to
16 the shoreline within the 8 1/2 mile project length would be limited to
17 four locations:

- 18 1) a crosswalk at 9th Street;
19 2) a pedestrian underpass at 27th Street;
20 3) a pedestrian underpass at 19th Street; and
21 4) an opening in the fence at 32nd Street.

22 Each of these locations is in the southerly half of the proposal and
23 no pedestrian crossings were proposed in the northern half of the
24

1 proposal. Automobile access would be at 19th Street and 29th Street
2 in the southern half of the proposal and at a county road known as "SC
3 Line" in the northern half of the proposal as well as at either end of
4 the proposal and at the interchange proposed at Olds Station Bridge.

5 Five automobile pull-out viewpoints are proposed, four in the
6 southern half and one in the northern half of the proposal. A new 28
7 foot-wide frontage road will be built south of the Olds Station Bridge.

8 A bicycle path is proposed for the southern half of the project.
9 This would be separate from the highway though close to it.

10 The proposal would eliminate 1.95 acres of wetland in eight
11 locations as well as 5.06 acres of riparian land. The proposal
12 includes three wildlife mitigation areas, one in the northern half of
13 the project and two in the southern half near Porter's Pond. The
14 latter would be fenced from public access to promote habitat for
15 wintering waterfowl.

16 The proposal requires significant alteration of the existing
17 topography. There will be major cuts (excavations), one up to 30 feet
18 deep near the northern terminus. Low areas, ravines and gullies will
19 be filled with an extensive embankment at the southern end. These
20 cuts and fills would be graded and planted. Drainage culverts,
21 including a seven foot wide one at the McNeil ravine, will cross under
22 the highway. There will be 3,800 lineal feet of rip rap placed at
23 five locations, including 700 feet tht will touch the River.

1 The highway will double the noise level which now exists in the
2 project area. Noise of traffic would be significant along the right
3 of way and at the Wenatchee Riverfront Park, across the Columbia,
4 unless unusual events such as lawn mowing at the Park drown out the
5 highway noise.

6 The estimated cost of Alternative 1 is \$12.5 million. This figure
7 does not include the cost of acquiring the right of way in 1957 nor
8 allocation of the shoreline's present market value of \$6-8 million.

9 XII

10 Alternative 2. This alternative upgrades Sunset Highway. It
11 would convert the existing highway from two lane to four lane from
12 East Wenatchee to the Olds Station Bridge. North of the Bridge there
13 would be upgraded, two lane service with a truck climbing lane. This
14 route provides left turn channelization at most existing
15 intersections. This route would not require any new highway
16 alignment, and is unique among the alternatives in that regard.

17 Because of the developed properties along Sunset Highway this
18 alternative would require displacement of some 82 houses and 11
19 commercial businesses. These numbers would increase if the upgrading
20 proposed in this alternative were postponed. The area is one which is
21 growing.

22 The estimated cost of Alternative 2 is \$32.6 million. The same
23 cost has also been estimated by DOT at \$21.5 million, however,
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1 depending upon the index for inflation which is used in calculation.
2 There would be additional costs to relocate utilities which would be
3 borne mainly by the utility providers.

4 XIII

5 Alternative 3. This route is an alternate design for improving
6 Sunset Highway. It is called the "couplet" because it would make
7 Sunset Highway one way northbound and the southbound traffic would be
8 shifted to Cascade Avenue which runs parallel to Sunset, also well
9 back from the Columbia River.

10 This would require displacement of 68 houses and 8 commercial
11 businesses. It would also have an adverse effect upon the community
12 between the two parallel routes. This area would be hemmed in by
13 traffic on two sides. The same would be true to a lesser extent with
14 proposed Alternative 1 and the community between it and Sunset Highway.

15 The estimated cost of Alternative 3 is \$31.1 million.

16 IX

17 Alternative 4. This route is the same as the proposed Alternative
18 1 along the Columbia shoreline from East Wenatchee to Olds Station
19 Bridge. It then moves inland from the river and follows the existing
20 Sunset Highway alignment.

21 This would require displacement of 8 homes and 4 commercial
22 businesses.

23 The estimated cost of Alternative 4, also without shoreline
24 acquisition costs included, is \$14.5 million.

X

Alternatives 5 and 6. These routes follow an upgraded Sunset Highway from Rocky Reach Dam south to the turn off for Olds Station Bridge, then depart from the urbanized area of East Wenatchee to rejoin SR 28 farther downriver. These are by-pass routes which avoid the East Wenatchee core while passing close to two out-lying airports.

These alternatives are the shortest distance between the northern and southern limits of the geographic area concerned. However, these are disfavored by DOT for failure to handle local traffic congestion. These would also move into the surrounding hills and require more extensive cutting and filling.

The estimated cost of alternative 5 is \$39.9 million. The estimated cost of alternative 6 is \$41.6 million.

XI

The capacity of a highway section is defined in terms of level of service, beginning at level of service A and continuing through level of service F. Level of service A describes complete free flow conditions. Level of service B is also indicative of free flow, although the presence of other vehicles begins to be noticeable. Level of service C represents a range in which the influence of traffic density on operations becomes marked. Level of service D borders on unstable flow. Level of service E represents operations at or near capacity, and is quite unstable. Level of service F represents forced or breakdown flow.

XII

In the context of this case, the present Sunset Highway and the six alternatives to it can each be rated for level of service. This can be done for both the present time and 17 years into the future at the planning year of 2004, and is shown in the exhibit which follows (north/south is relative to Olds Station Bridge):

LEVEL OF SERVICE - ALTERNATIVE ROUTES

Final EIS

ALT.	ALT. #	ALTERNATIVE		SUNSET		Comment
		North of Bridge	South of Bridge	North of Bridge	South of Bridge	
		1986/ 2004	1986/ 2004	1986/ 2004	1986/ 2004	
NO BUILD	-	-----		C/E	C/F*	*D - Peak Period
. RIVER ROUTE (Preferred DOT)	1	B/C	B/D	A/A	B/B*	*C - 9th St. Int
. SUNSET IMPROVED	2	B/C	A/B	-	-	Backups at Valle Mall, 9th & Olds Station
. COUPLET (Sunset/Cascade)	3	B/C	A/B	-	-	Similar - AH 2
. EXIST. NO OF BRIDGE Alt. 1 - South	4	B/C (Same as Alt. 1)	B/D	A/A	B/B*	*C - 9th St. Int
. BLUFF ROUTE SO. OF BRIDGE	5	A/A	A/B*	C/C	C/E	*B/C - Eastmont to Sunset Grade
. BADGER MOUNTAIN	6	A/A	A/A*	C/E	C/F	*B - Badger to Sunset Grade

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(11)

XIII

As shown above, either shoreline alternative (no. 1 or no. 4) provides the lowest level of service among the alternatives, both now and in 17 years. Moreover, in 17 years the level of service from the shoreline alternatives would be inferior to that now provided by the Sunset Highway which is the problem that has given rise to the alternatives. It is therefore probable that the proposed two lane shoreline alternatives would shortly result in the need for building one of the non-shoreline alternatives also, or the expansion of the shoreline alternatives to four lane routes. Conversely, building a non-shoreline alternative now does not suggest the need of a shoreline route.

XIV

Within the budget planning done by DOT, the highway alternatives under consideration would be classified as "Major Non-Interstate Construction." For the two year fiscal period 1987-89, \$128 million was requested by DOT for Major Non-Interstate Construction. The total highway construction budget requested by DOT for that two year period is over \$1 billion. The Transportation Commission determines the final allotment of this construction budget.

XV

The shoreline of the Columbia River at issue here is designated a shoreline of statewide significance by both the Shoreline Management Act

1 (See RCW 90.58.030(2)(e)(v)(B) and -.030(2)(e)(vi) and the Douglas
2 County Shoreline Master Program at Section III, page 5.

3 XVI

4 On April 15, 1986, DOT applied to Douglas County for a shoreline
5 substantial development permit for the shoreline highway described as
6 Alternative 1. At this same approximate time DOT also applied to the
7 City of East Wenatchee for a shoreline substantial development permit.
8 The proposed highway would be within both the unincorporated (Douglas
9 County) and incorporated (East Wenatchee) portions of the East Wenatchee
10 area.

11 XVII

12 The shoreline applications did reflect a minor alignment adjustment
13 from Alternative 1. The alignment was shifted easterly an average of 76
14 feet at places in the southern portion of the proposal. The realignment
15 reduced the fill in wetlands from 1.95 acres to 1.51 acres. An addendum
16 to the final impact statement was published to set forth this minor
17 adjustment.

18 XVIII

19 Douglas County and East Wenatchee published notice of DOT's
20 shoreline application on April 23 and 30, 1986. The publication was in
21 a legal newspaper of general circulation within the area of the proposed
22 development. Thereafter there were hearings before the planning
23 commissions of both Douglas County and East Wenatchee. Public notice
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1 was given of the hearing before both planning commissions. Appellants,
2 herein, appeared and gave comment at the hearing before the Douglas
3 County Planning Commission conducted on June 18, 1986. The record of
4 that hearing was available to the Douglas County Commissioners. The
5 evidence before us does not disclose whether appellants herein attended
6 the hearing of the East Wenatchee Planning Commission. However, the
7 East Wenatchee City Council conducted a further public hearing on July
8 21, 1986, at which appellants, herein, did appear and give comment.

9
10 XIX

11 Chairman John Tontz of the Douglas County Board of County
12 Commissioners owns property lying alongside the proposed highway. He
13 purchased 15 acres of that property in 1974. He first became aware of
14 the DOT highway right of way about 1975. He has leased 5 additional
15 acres from DOT which is within the adjacent highway right of way. In
16 1984, Commissioner Tontz exercised a right of first refusal to acquire 9
17 more acres adjacent to this 15 acres, and also lying alongside the
18 highway right of way. All of these lands are currently in orchard use.
19 Construction of the proposed highway would terminate the 5 acre lease
20 from DOT. The only automobile access to the northern portion of the
21 proposed highway would intersect with the highway at the location of
22 Commissioner Tontz's remaining 24 acres. Commissioner Tontz
23 participated in the Douglas County Commissioners' approval of the
24 shoreline permit for the proposed highway. His was one of the three
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1 votes unanimously approving the permit. Appellants herein were aware of
2 Commissioner Tontz's property ownership. They did not voice objection
3 to his participation though present at the meeting at which the
4 Commissioners gave their approval.

5 XX

6 The Douglas County Shoreline Master Program (DCSMP) was adopted for
7 both Douglas County and the City of East Wenatchee. It is adopted
8 pursuant to the Shoreline Management Act for the purpose of implementing
9 that Act. The DCSMP was approved by the State Department of Ecology in
10 1975.

11 XXI

12 The DCSMP designates shorelines within its jurisdiction as either
13 "Natural", "Conservancy", "Rural", or "Urban". The shoreline placed at
14 issue by the proposed highway is designated Rural by the DCSMP.
15 Appendix I, Map 3.

16 XXII

17 Within the Rural environment roads and railroads are permitted by
18 the DCSMP subject to:

19 1. Demonstration by the applicant of compliance with
20 the regulations specified on any federal and state
permits required for such projects.

21 2. Access to the waterfront for pedestrians shall be
22 provided, wherever feasible and desirable.

23 3. Natural watercourses shall be protected.

24 DCSMP Section 20.30, page 26.

25
26 FINAL FINDINGS OF FACT,
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XXIII

Within any shoreline environment, roads and railroads must be consistent with the following policies of the DCSMP:

A. Whenever feasible and desirable, roads and railroads should be located away from shorelands, except for frontage roads and roads serving port and recreational facilities.

B. Roads located in wetland areas should be designed and maintained to prevent erosion and to permit a natural movement of groundwater, wherever feasible.

C. Scenic corridors with public roadways should have provisions for safe pedestrian and other non-motorized travel. Also, provision should be made for sufficient viewpoints, rest areas, and picnic areas in public shorelines.

D. Extensive loops or spurs of old highways with high aesthetic quality should be kept in service as bypass routes, where feasible.

E. All construction should be conducted to protect the adjacent shorelands and water against erosion, uncontrolled drainage, slides, pollution, fills and other factors detrimental to the environment.

F. Road locations should be planned to fit the natural topography so that minimum alterations of natural conditions will be necessary.

DCSMP Section XX, Policies, page 25.

XXIV

The DCSMP measures proposed development against both its provisions and the policy of the Shoreline Management Act. DCSMP Implementation Ordinance Appendix III, Section 6 B., page 60. The DCSMP applies priorities for shorelines of statewide significance to all shorelines under its jurisdiction. DCSMP, Section XXIV, paragraph 4, page 32.

FINAL FINDINGS OF FACT,
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(16)

XXV

On July 14, 1986, the Douglas County Board of County Commissioners granted approval of a shorelines substantial development permit for the proposed shoreline highway. Similar approval was granted by the City of East Wenatchee. The approval of Douglas County was conditioned upon "all mitigation provisions of the final environmental impact statement, including attachment A, and Wetland Mitigation Plan".

Appellants Washington Environmental Council, et al., filed their requests for review with this Board on August 20, 1986, and September 23, 1986. Appellant Robert W. Johnson filed his request for review with this Board on August 22, 1986.

XXVI

After review was requested by appellants, the State Department of Ecology (DOE) gave notice of intervention under the statutory right conferred at RCW 90.58.180(1). During the pendency of this matter before us, but prior to hearing, DOT and DOE presented a "Stipulation and Order Re: Modification of Permits and to Dismiss Department of Ecology". This was executed by DOT, DOE and Douglas County but not appellants. The stipulation incorporated eight additional conditions into the shoreline highway proposal. The salient features of each condition are as follows:

1. Interpretive signs will be placed at 19th Avenue and Rocky Reach Dam viewpoints.

2. A boat launch will be maintained in an unimproved state near Olds Station Bridge.
3. A pedestrian/bicycle access across the highway shall be located at the county access road in the northern half of the proposal.
4. The bikeway will be extended under Olds Station Bridge and up to the northern half of the highway where cyclists will cross the highway at an uncontrolled spot and ride northbound on the highway shoulder, then re-cross the highway to return southbound on the highway shoulder.
5. Two additional automobile viewpoint turnouts, both in the northern half of the proposal.
6. Highway signs for parking/viewpoint areas.
7. Adjacent lands between highway and river to be maintained in DC ownership for possible future transfer of management jurisdiction to the other public agencies.
8. Litter Patrol Youth Corps of DOE will pick up the litter.

XXVII

Any Conclusion of Law hereinafter determined to be a Finding of Fact is hereby adopted as such.

From these Facts, the Board comes to these

CONCLUSIONS OF LAW

I

We are presented with five threshold issues for determination:

FINAL FINDINGS OF FACT,
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1) Standing of Washington Environmental Council, Friends of the Columbia, and Michael W. Gendler as Appellants.

2) Need of a Supplemental EIS.

3) Adequacy of Public Notice of Local Government Proceedings.

4) Appearance of Fairness or Conflict of Interest.

5) Ascertainability of the Proposed Development.

We now turn our consideration to each of these.

II

Standing of Washington Environmental Council, Friends of the Columbia and Michael W. Gendler. In its written closing argument filed after hearing, Douglas County raised for the first time the question of standing. Specifically it admitted the standing of appellants Clifford Bates, Save the Riverfront Committee and Robert W. Johnson while disputing the standing of Washington Environmental Council, Friends of the Columbia and Michael W. Gendler. Such a dispute is not properly before us in light of the Pre-Hearing Order entered in this matter on October 27, 1986. That Order sets forth the issues for decision. A dispute over standing is not among them. The Order provides that the issues therein shall control the subsequent course of proceedings unless modified for good cause by subsequent order of this Board, citing our rule of procedure at WAC 461-08-140. Douglas County has not moved for an order amending the Pre-Hearing Order, nor has good cause been shown. We decline to admit this untimely issue. See also Kitsap County v. Department of Natural Resources, 99 Wn. 2d 386 (1983).

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(19)

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III

Need of a Supplemental EIS. In our Order Excluding Certain Issues and Granting Partial Summary Judgement entered February 27, 1987, we reserved the issue of whether a supplemental environmental impact statement is required to address revisions to the proposed development subsequent to the final EIS. The only such revision at the time DOT filed its shoreline permit applications was the minor alignment adjustment described in our Finding of Fact XVII, above. Under the rules implementing the State Environmental Policy Act (SEPA), a supplemental impact statement is appropriate where there are:

- 1) Substantial changes so that the proposal is likely to have significant adverse environmental impacts; or
- 2) New information indicating a proposal's probable significant adverse environmental impact. WAC 197-11-600(4)(d).

We conclude that the minor alignment adjustment did not involve significant adverse environmental impact, and that no supplemental EIS was required on that account.

Further revision to the proposed development was presented by the DOE - DOT stipulation entered into after these proceedings began. The eight points of that stipulation are summarized at Finding of Fact XXVI, above. We conclude that the measures proposed in that stipulation also involve no significant adverse environmental impact and that no supplemental EIS was required on that account. Moreover, in reviewing

1 the proposed shoreline highway we will include within our consideration
2 the eight point revision to the proposal brought about by that
3 stipulation. We conclude that these do not alter the scope or intent of
4 the shoreline application and therefore are appropriate for our
5 consideration. The standard of "scope and intent" in this context of
6 changes to a proposal during a proceeding before us is drawn by analogy
7 to the rule allowing administrative revisions to a permit after
8 issuance, WAC 173-14-064. Bullitt, Ramamurti, et al. v. City of
9 Seattle, SHB No. 81-29 (1983). See, also, Holland v. Kitsap County, SHB
10 No. 86-22 (1987).

11 We conclude that the proposed highway as revised by the minor
12 alignment adjustment and the DOE stipulation is properly before us for
13 review, and that no supplemental EIS is required.¹

14 IV

15 Adequacy of Public Notice of Local Government Proceedings.

16 Appellants have not shown that the public notice of local government
17 shoreline proceedings were inconsistent with the Shoreline Management
18 Act. Moreover, there has been no showing that any procedure followed by
19 local government in this matter mislead interested persons or deprived
20 any person of their opportunity to comment regarding the proposal. We
21 conclude that public notice of local shoreline proceedings was
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23
24 ¹ An addendum to the EIS describing the provisions of the DOE-DOT
25 stipulation would have been desirable.

adequate. See, The Other Side of the Tracks Neighborhood Steering Committee v. Sumner. SHB No. 84-9 (1984). Compare, Schwinge v. Town of Friday Harbor, SHB No. 84-31 (1985).

V

Appearance of Fairness or Conflict of Interest. Appellants assert that Commissioner Tontz violated the appearance of fairness doctrine or had an actual conflict of interest in participating in the approval rendered by Douglas County. We announce today a new rule of decision by which we will now and henceforth refrain from entertaining or resolving appearance of fairness or conflict of interest issues arising from local shoreline proceedings. We are persuaded by experience that the de novo hearing conducted before us affords an adequate procedural safeguard even where these issues are excluded. The resolution of such appearance of fairness or conflict of interest allegations regardless of outcome, would not alter the determination which we will reach regarding the merits of a proposed development. Neither do such allegations, even if proven, hinder the ability of persons either to seek review from this Board or fully present evidence before us. Such is not the case with SEPA or public notice issues which we have resolved in this matter and will continue to resolve when raised in the future. We decline to resolve the appearance of fairness or conflict of interest allegations presented in this matter.

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2 VI

3 Ascertainability of the Proposed Development. Appellants contend
4 that the shoreline permits now before us do not sufficiently set forth
5 the proposed development that was approved. We disagree. The standard
6 in this regard is whether the proposal is described in sufficient detail
7 to enable the local government and this Board to determine consistency
8 with the Shoreline Management Act and implementing regulations. Hayes
9 v. Yount, 87 W.2d 280, 552 P.2d 1038 (1976). The shoreline permits
10 before us, appellant points out, incorporate other documents by
11 reference. A proposal and its mitigation measures may be appropriately
12 described through such incorporation by reference. Nisqually Delta
13 Association v. City of DuPont and Weyerhaeuser Company, SHB No. 81-8
14 (1982). The permits before us describe the proposed development in
15 sufficient detail and its features are sufficiently ascertainable to
16 determine consistency with the Shoreline Management Act and implementing
17 regulations.

18 VII

19 We review the proposed development for consistency with the
20 Shoreline Management Act, chapter 90.58 RCW, and the applicable master
21 program. RCW 90.58.140(2)(b). We reject the contention of respondents
22 that the policy within the Shoreline Management Act for shorelines of
23 statewide significance is to be used only in the formulation of local
24

1 master programs and that it is not also a measure of the proposed
2 development. The contrary is expressly provided by RCW 90.58.140(2)(b)
3 cited above, which provides:

4 (2) A substantial development shall not be
5 undertaken on shorelines of the state without first
6 obtaining a permit from the government entity having
administrative jurisdiction under this chapter.

7 A permit shall be granted:

8 (a) From June 1, 1971, until such time as an
9 applicable master program has become effective, only
10 when the development proposed is consistent with: (i)
11 The policy of RCW 90.58.020; and (ii) after their
adoption, the guidelines and rules of the department;
and (iii) so far as can be ascertained, the master
program being developed for the area;

12 (b) After adoption or approval, as appropriate, by
13 the department of an applicable master program, only
14 when the development proposed is consistent with the
applicable master program and the provisions of
chapter 90.58 RCW. (Emphasis added).

15 The policy for shorelines of statewide significance is a provision of
16 chapter 90.58 RCW, which is the Shoreline Management Act. Moreover,
17 in Nisqually Delta Association, et al. v. City of Dupont and
18 Weyerhaeuser Company, SHB No. 81-8 and 81-36 (1982) cited by
19 respondents, we did not apply the master program, as suggested, to the
20 exclusion of the policy of the Act for shorelines of statewide
21 significance. Rather, we held the master program to presumptively
22 invoke the policies of the Act, and reached our conclusion only after
23 being satisfied that those policies were met by the proposed
24 development. Likewise, where a master program fails to invoke

6. Increase recreational opportunities for the public in the shorelines;

7. Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

RCW 90.58.020.

IX

The proposed shoreline highway, if built, would irretrievably commit the shoreline in question to highway use now and for the future. The term of good service to be expected from that highway, however, is of comparatively brief duration. The primary enticement to construct the highway is its low out-of-pocket cost. That factor obscures the incomplete solution which it would provide for long term traffic congestion in the greater corridor. Moreover, the ostensible low cost vanishes when, in the near future, resort must be taken to other highway improvements such as the increasing the number of lanes of the highway or construction of a non-shoreline alternative to this proposal. But low cost is not all that would vanish with the proposed highway. In addition, the public's opportunity to enjoy the physical and aesthetic qualities of this natural shoreline of the state shall vanish as well. The Shoreline Management Act preserves the public's opportunity to enjoy the natural shorelines "to the greatest extent feasible consistent with the overall best interest of the state and people generally." RCW 90.58.020. We take this to mean that natural shorelines of the state

adequately the policies for shorelines of statewide significance, we have applied those policies directly to the proposed development. Friends of the Columbia Gorge v. Skamania County and Elizabeth Roane Jung Land Trust, SHB No. 84-57 and 84-60 (1986). Therefore, all development proposed on shorelines of statewide significance must be reviewed for consistency with the policy of the Shoreline Management Act for shorelines of statewide significance.²

VIII

Under the Shoreline Management Act, specifically restrictive policies apply where shorelines of statewide significance are concerned, as in this case. On such shorelines, uses are preferred in the following order of preference:

1. Recognize and protect statewide interest over local interest;
2. Preserve the natural character of the shoreline;
3. Result in long term over short term benefit;
4. Protect the resources and ecology of the shoreline;
5. Increase public access to publicly owned areas of the shorelines;

² To the extent that any contrary indication is given by the pre-master program case of Department of Ecology v. Chelan County and Schmitt, SHB No. 65 (1973), the same is overruled. We also note that the quotation from that case cited by respondent (State Respondent's Closing Argument, p. 11, lines 16-20) was from a split opinion which was not subscribed by a majority of the Board at the time it was written.

1 need not yield to highway development, such as proposed here, that would
2 permanently deprive the shorelines of their natural character in return
3 for short term traffic improvement. The proposed development does not
4 "result in long term over short term benefits" or "recognize and protect
5 statewide interest over local interest." See, Friends of the Columbia
6 Gorge v. Skamania County, supra. Compare, Robert B. Wilcox, et al. v.
7 Yakima County, Washington State Department of Highways and Washington
8 State Department of Ecology, SHB No. 77-28 (1978).

9 X

10 The proposed 8 1/2 mile, two lane state highway does not "preserve
11 the natural character of the shoreline" nor "protect the resources and
12 ecology of the shoreline".

3 XI

14 The proposed shoreline highway and the fence along its margin
15 would constitute a serpentine barrier that would separate the residents
16 of a populous community from the shoreline at their doorstep. The sum
17 total of a pedestrian path here and a bicycle path there cannot make up
18 for this. The publicly owned shoreline, which includes the river
19 itself, would see a net reduction in public access as a result. Neither
20 does the evidence support the theory that limiting public access to the
21 shoreline is justified for the greater good of wildlife. Waterfowl and
22 bald eagles now tolerate a great variety of unstructured public
23 recreation on the shoreline. The reduction in recreational opportunity
24

1 flows mainly from the highway itself and its fencing, not from wildlife
2 imperatives. The proposed development does not "increase public access
3 to publicly owned areas of the shoreline" or "increase recreational
4 opportunities for the public in the shoreline."

5 XII

6 The proposed development is inconsistent with the provisions of
7 the Shoreline Management Act, chapter 90.58 RCW, relating to shorelines
8 of statewide significance. The proposed development is also
9 inconsistent with the Act's policy applicable to all shorelines that the
10 public's opportunity to enjoy natural shorelines shall be preserved to
11 the greatest extent, feasible consistent with the overall best interest
12 of the state and people generally.

13 XIII

14 Local governments are directed by the Shorelines Management Act to
15 adopt shoreline master programs to implement the Act with regard to
16 shorelines within their jurisdictions. RCW 90.58.040 to -.130.

17 XIV

18 The Douglas County Shoreline Master Program (DCSMP) is applicable
19 to this proposal. Under the DCSMP, roads are permitted only when
20 consistent with the policy that:

21
22 Whenever feasible and desirable, roads and railroads
23 should be located away from shorelands, except for
24 frontage roads and roads serving ports and recreational
25 facilities. DCSMP, Section XX A., p. 25. (Emphasis added).

1 The proposed state highway does not come within the frontage or service
2 road exceptions. The applicable policy is therefore the portion
3 underscored above. This policy is a mandatory antecedent to road
4 construction. It is not superceded by the additional use regulations
5 applicable to the rural environment (DCSMP, Section 20.30, page 26).³
6 Therefore, the question before us is: Whether it is feasible and
7 desirable to locate the proposed road away from the shorelands?

8 XV

9 Feasible. There are four non-shoreline alternatives to the
10 proposed highway. These are not rendered infeasible by topography or
11 difficulty in acquiring right of way. Compare, Wilcox v. Yakima
12 County, supra. Neither do the alternatives appear to involve cost or
13 other considerations which would render them infeasible. We conclude
14 that it is feasible to locate the highway away from the shoreline.

15
16 ³ Respondents point out by analogy that use regulations for the
17 conservancy environment (DCSMP, Section 20.20, p. 26) contain a
18 requirement for:

19 Demonstration by the applicant that no other route corridor can be
20 economically and physically utilized.

21 We construe this to mean that, in the conservancy environment, the
22 quoted use regulation does supercede the "feasible" and "desirable"
23 rule of Section XX, A. because it is a more stringent standard on the
24 same subject for the more protected conservancy environment. In
25 effect, the conservancy regulation excludes roads where another route
26 is feasible ("can be economically and physically utilized") without the
27 further determination that to do so is desirable. There is no
28 equivalent use regulation in the rural or urban environment and
29 therefore the feasible and desirable standard of Section XX, A. comes
30 to bear. We reject the respondent's contention that the feasible and
31 desirable standard of Section XX, A. is not applicable in the rural and
32 urban environment as that would leave it applicable nowhere.

33 FINAL FINDINGS OF FACT,
34 CONCLUSIONS OF LAW AND ORDER
35 SHB NOS. 86-34, 36 & 39

XVI

Desirable. The term "desirable" in the DCSMP must be read to give effect to the Shoreline Management Act which it was intended to implement. Because, as we have concluded, the proposed highway is inconsistent with the policy of the Act, it is "desirable" to locate the highway away from the shoreline.

XVII

Shorelands. Respondents contend that the term "shorelands" in the DCSMP has the same meaning as is given that term by the Aquatic Lands Act, chapter 79.90 RCW, relating to the state's proprietary interest in aquatic land. This definition is:

Whenever used in chapters 79.90 through 79.96 RCW the term "first class shorelands" means the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, or inner harbor line where established and within or in front of the corporate limits of any city of within two miles thereof upon either side. RCW 79.90.040. See also RCW 79.90.045. (Emphasis added).

We might agree with this contention if the DCSMP were adopted to implement the Aquatic Lands Act or if the issue at hand were aquatic lands ownership. However, the DCSMP was adopted to implement the Shoreline Management Act, and the issue at hand is the regulation, not ownership, of land. We conclude that the definition in chapter 79.90 RCW, above, does not apply. We further conclude that since the term "shorelands" is not specially defined within the DCSMP it should be

1 given its usual and ordinary meaning. Department of Revenue v. Hoppe,
2 82 W.2d 549, 552 P.2d 1094 (1973). Webster's Third New International
3 Dictionary, (1971), defines "shoreland" as "land along a shore". This
4 definition emphasizing "land" is in contrast to the definition of RCW
5 79.90.040 quoted above which imparts a technical meaning, for
6 proprietary purposes, that emphasizes the water line itself or submerged
7 areas. The "shorelands" which the DCSMP cites should be read to give
8 effect to the Shoreline Management Act which the DCSMP implements. We
9 conclude that the DCSMP term, "shorelands" is synonymous with the Act's
10 term "shorelines" which, by RCW 90.58.030(2), means at least "those
11 lands extending landward for two hundred feet in all directions as
12 measured on a horizontal plane from the ordinary high water mark".
13 Locating roads "away from the shorelands" under the DCSMP therefore
14 means away from the shorelines under the jurisdiction of the Shoreline
15 Management Act.

16 XVIII

17 It is feasible and desirable to locate the proposed highway away
18 from the shorelands. The proposed development is inconsistent with
19 Section XX, A. of the DCSMP.

20 XIX

21 In summary, the proposed development was accompanied by an adequate
22 environmental impact statement, was preceded by adequate public notice
23 and its features are sufficiently ascertainable for review. However,
24

1 the proposed development is inconsistent with the applicable master
2 program and the provisions of the Shoreline Management Act. We hold
3 that the substantial development permits which are the subject of this
4 case must be reversed.

5 XX

6 Because of the disposition which we make, we deem it unnecessary to
7 resolve the issue of substantive compliance with the State Environmental
8 Policy Act.

9 XXI

10 Any Finding of Fact which is deemed a Conclusion of Law is hereby
11 adopted as such.

12 From these Conclusions, the Board enters this
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26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
SHE NOS. 86-34, 36 & 39

(32)

ORDER

The shoreline substantial development permits granted by Douglas County and the City of East Wenatchee to the Washington State Department of Transportation for SR 2/ SR 28 are reversed.

DONE at Lacey, WA this 12th day of January, 1988.

SHORELINES HEARINGS BOARD

WICK DUFFORD, Chairman

LAWRENCE J. FAULK, Member

JUDITH A. BENDOR, Member

(See Concurring and Dissenting Opinion)
NANCY BURNETT, Member

(See Concurring and Dissenting Opinion)
ANNETTE S. MCGEE, Member

DENNIS J. McLERRAN, Member

WILLIAM A. HARRISON
Administrative Appeals Judge

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
SHB NOS. 86-34, 36 & 39

1 Nancy Burnett and Annette S. McGee,
2 CONCURRING AND DISSENTING:

3 We concur in the majority opinion regarding the threshold issues
4 at Conclusions of Law II, III, IV, V and VI.

5 These issues involve:

- 6 1) Standing of Washington Environmental Council, Friends of the
7 Columbia, and Michael W. Gendler as appellants.
8 2) Need of a Supplemental EIS.
9 3) Adequacy of Public Notice of Local Government Proceedings.
10 4) Appearance of Fairness or Conflict of Interest.
11 5) Ascertainability of the Proposed Development.

12 We dissent from the remainder of the majority opinion for the
3 reasons which follow:

14 The project is within a shoreline of statewide significance and
15 the following policies apply:

16 1. Recognize and protect statewide interest over local interest.

17 The DOT has a responsibility to project and implement highway
18 needs for the entire state. The need for improved highways in
19 this 8 1/2 mile area have been considered to the year of 2004. We
20 believe that it is not reasonable to demand estimates for future
21 needs beyond that time. DOT is responsible for spending all state
22 taxpayers monies on highway needs, and in their judgment this
23 project most adequately meets those needs. It is also noted that
24 this project improves transportation capabilities for agricultural
25

26 CONCURRING & DISSENTING OPINION
27 BURNETT & MCGEE
SHB Nos. 86-34, 36, 39

(1)

products because of the lack of rail facilities in the area, which is a growing problem in Eastern Washington with the abandonment of other rail lines.

2. Preserve the natural character of the Shoreline.

The area in question is not in pristine condition and in fact has been degraded by public use not monitored. A site visit resulted in viewing abandoned cars, garbage and deep tracks as the result of vehicular activity. Preserving the shoreline in its present state would not be a favor to any citizen of the state.

3. Result in long term over short term benefit.

As stated before, the DOT has projected use for this area to the year 2004, which seems reasonable. For this Board to determine what in fact, is long term is presumptuous. DOT did not make a short term decision. The right of way has been there since the 1950's which seems more than sufficient time for appellants to negotiate differences. Also, more people will have the opportunity to observe the shoreline from the projected highway than now possible. There would also be recreational use from vistas and bike paths. Part of the attraction of Washington state is the ability of tourists to enjoy the many unique vistas of our bodies of water.

4. Protect the resources and ecology of the shoreline.

Outstanding efforts have been made by DOT to minimize damages to the shoreline's resources. Among other things they have agreed to

1 create three wetland mitigation areas which will include eagle
2 nesting areas and breeding sites for geese. They have agreed to
3 move the highway an additional 76' away from the shoreline to
4 reduce traffic impact and have designed methods to reduce runoff
5 problems and noise impact.

6 5. Increase public access to publicly owned areas of the shorelines.

7 In addition to the increased viewing opportunities as stated
8 before, accommodations have been made for easy access to the
9 area. In its present state local residents have accessed the
10 shoreline, but not always in a responsible way. With the proposed
11 project, a bicycle path, viewpoint parking areas, boat access
12 improvements, etc., will be added to accommodate further enjoyment
13 by all of the public to the Columbia River.

14 6. Increase recreational opportunities for the public in the
15 shorelines.


16 The recreation now enjoyed by some local residents consists mainly
17 of those that enjoy passive pleasures, i.e., walking, picnicing,
18 bird watching. Some others enjoy snowmobiles and other vehicular
19 sports which can interfere with other's enjoyment of the shore.
20 Others participate in boating, fishing and others on water
21 activities. None of the positive activities in this area would be
22 diminished - on the contrary more people would be aware of access
23 to the shoreline. It was argued by appellants that public parks
24

1 would be a more desirable use for the shoreline. We could not
2 find any public or private entity that anticipated the possibility
3 of such a project.

4 The Douglas County MSP states that whenever feasible and
5 desirable, roads and railroads should be located away from
6 shorelands. In addition to the fact that the mandatory word shall
7 is not part of the statement, we believe all the respondents have
8 demonstrated that alternative #1 is the most feasible and
9 desirable of all the routes studied.

1 In conclusion we feel that the respondents demonstrated thorough
2 and sincere efforts to comply with all areas of the SMA and DCMSP. To
3 the contrary, we don't feel the appellants, who bear the burden of
4 proof, have shown that the proposed highway violates any conditions
5 imposed by the SMA or DCMSP.
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9 NANCY BURNETT, Member

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11 ANNETTE MCGEE, Member
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26 DISSENTING OPINION
27 BURNETT & MCGEE
SHB Nos. 86-34, 36, 39

The "ORDER" on p. 7 hereof
was read to the parties
over the telephone at 10:00 AM
on Friday, February 27, 1987

WJH

ANT

Shorelines H.B.

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

In the matter of Shoreline
Substantial Development Permits
Granted by Douglas County and the
City of East Wenatchee to
Washington State Department of
Transportation,

WEC, Save the Riverfront Committee,
Friends of the Columbia, Clifford and
Mary Bates, Robert W. Johnson and
Michael W. Gendler and State of
Washington, Department of Ecology

Appellants,

v.

Douglas County, City of East
Wenatchee, and State of
Washington, Department of
Transportation,

Respondents.

SHB Nos. 86-34, 86-36
and 86-39

ORDER EXCLUDING
CERTAIN ISSUES AND
GRANTING PARTIAL
SUMMARY JUDGMENT

On February 17, 1987, respondent State of Washington Department of
Transportation (DOT) filed its Motion for Order to Exclude Appellant's
Claims. On February 24, 1987, appellants Washington Environmental
Council, et. al. filed its Memorandum in Opposition to DOT Motion to
Exclude SEPA Claims.

1 Having considered the following:

- 2
- 3 1. Respondent's Motion for Order to Exclude Appellants'
- 4 Claims, filed February 17, 1987.
- 5 2. Memorandum in Support of Respondent's Motion for Order
- 6 to Exclude Appellants' Claims, filed February 17, 1987.
- 7 3. Affidavit of Charles F. Secrest and attachments thereto,
- 8 filed February 17, 1987.
- 9 4. Appellant's Memorandum in Opposition to DOT Motion to
- 10 Exclude SEPA Claims filed February 24, 1987.
- 11

12 together with the records and file herein and, being fully advised,

13 the Board makes the following findings of uncontested fact:

14 1. The proposal formulated by DOT staff in this matter is the

15 location of a highway along the Columbia River near East Wenatchee.

16 2. The DOT prepared an environmental impact statement (EIS) for

17 the proposal.

18 3. On August 15, 1985, and with the final EIS before it, the

19 Washington State Transportation Commission approved the riverfront

20 corridor for the highway.

21 4. On August 29, 1985, pursuant to the State Environmental Policy

22 Act (SEPA) at RCW 43.21C.080, a "Notice of Action" was published with

23 regard to the Commission's riverfront corridor decision.

24

25

26 SHB Nos. 86-34, 86-36 and 86-39

27 ORDER EXCLUDING CERTAIN ISSUES

AND GRANTING PARTIAL SUMMARY

JUDGMENT

1 5. Appellants herein, Washington Environmental Council (WEC),
2 timely appealed from the Commission's riverfront corridor decision to
3 an Administrative Law Judge appointed by the Commission.

4 6. The WEC challenged the adequacy of the EIS in the appeal
5 proceeding before the Administrative Law Judge, including treatment of
6 alternatives and the need of a supplemental EIS.

7 7. On April 4, 1986, the Administrative Law Judge affirmed both
8 the adequacy of the EIS and the Commission's riverfront corridor
9 decision in a proposed decision.

10 8. On May 15, 1986, the Commission adopted the proposed decision
11 of the Administrative Law Judge as its final decision in the appeal.

12 9. The final decision of the Commission in the appeal was further
13 appealed by WEC to the Douglas County Superior Court which by
14 Memorandum Opinion dated February 5, 1987, affirmed the Commission and
15 denied the relief sought by WEC.

16
17 From which the Board makes the following Conclusions of Law:
18

19 1. RCW 43.21C.080 of SEPA provides, in pertinent part:

20 (2) (a) Any action to set aside, enjoin, review, or
21 otherwise challenge any such governmental action for
22 which notice is given as provided in subsection (1) of
23 this section on grounds of noncompliance with the
24 provisions of this chapter shall be commenced within
25 thirty days from the date of last newspaper publication
of the notice pursuant to subsection (1) of this
section, or be barred: Provided, however, That the time
period within which an action shall be commenced shall
be ninety days (i) for projects to be performed by a
governmental agency or to be performed under government

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ORDER EXCLUDING CERTAIN ISSUES
27 AND GRANTING PARTIAL SUMMARY
JUDGMENT

(3)

1 contract, or (ii) for thermal power plant projects:
2 Provided further, That any subsequent governmental
3 action on the proposal for which notice has been given
4 as provided in subsection (1) of this section shall not
5 be set aside, enjoined, reviewed, or otherwise
6 challenged on grounds of noncompliance with the
7 provisions of RCW 43.21C.030(2)(a) through (h) unless
8 there has been a substantial change in the proposal
9 between the time of the first governmental action and
10 the subsequent governmental action, or unless the action
11 now being considered was identified in an earlier
12 detailed statement or declaration of nonsignificance as
13 being one which would require further environmental
14 evaluation. (Emphasis added)

15 2. Applying the underscored language to the facts of this case,
16 the shoreline permits now before us for review were granted in July
17 and August 1986. These are therefore "subsequent governmental action"
18 in view of the earlier governmental action of the Transportation
19 Commission approving a riverfront corridor on August 15, 1985.
20 Apparently under RCW 43.21C.075, the Transportation Commission
21 provided for an in-house appeal of both its riverfront corridor
22 decision and the underlying EIS. The WEC availed itself of this
23 appeal right within the time limitations of RCW 43.21C.080 and brought
24 its challenge to EIS adequacy, including the need of a supplemental
25 EIS, in that forum. It follows, however, that a similar challenge to
26 the adequacy of the EIS is barred by the underscored wording of RCW
27 43.21C.080 in this review of the shoreline permit. Accord SAVE v.
Koll Co. SHB No. 82-29, et. al. (Order Granting Partial Summary
Judgment) (1983) and Nisqually Delta Association v. Weyerhaeuser SHB
No. 81-8, et. al. (Conclusion of Law IV) (1982). Also see R. SETTLE,
THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT (1987) at p. 257.

SHB Nos. 86-34, 86-36 and 86-39
ORDER EXCLUDING CERTAIN ISSUES
AND GRANTING PARTIAL SUMMARY
JUDGMENT

1 3. We reach this conclusion with two caveats. First, the cited
2 language leaves open an adequacy challenge which is based upon a
3 substantial change in the proposal between the first governmental
4 action (Transportation Commission action on August 15, 1985) and the
5 subsequent governmental action (local government shoreline approval in
6 July and August, 1986). This subject was not conclusively addressed
7 on this motion record and may be addressed at hearing. Second, the
8 bar to SEPA challenges under RCW 43.21C.080 specifies that the bar is
9 applicable only in the matter of noncompliance with RCW
10 43.32C.030(2)(a) through (h) which are procedural requirements.
11 Nothing therein bars a challenge to the shoreline approvals now on
12 review based upon noncompliance with the substantive requirements of
13 SEPA at RCW 43.21C.060. The previous riverfront corridor approval by
14 the Commission does not compel us to reach any particular conclusion
15 upon the substantive effect of SEPA in reviewing these shoreline
16 approvals. As stated in Natural Resources v. Thurston County, 92 Wn
17 2d 656, 667 (1979):

18
19 In summary, the environmental determinations mandated by
20 SEPA are uniquely related to the particular decision
21 being taken, and are conclusive only for that purpose.

22 Also see R. SETTLE, id.

23 4. The provisions of RCW 43.21C.080 cited and applied above
24 represent a statutory application of the principles or collateral
25 estoppel and res judicata. The statute is therefore the means by

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27 ORDER EXCLUDING CERTAIN ISSUES
AND GRANTING PARTIAL SUMMARY
JUDGMENT

1 which these principles are to be applied in SEPA cases.

2 5. Lastly, DOT urges that appellant is barred from
3 challenging, in these proceedings, the Transportation
4 Commission's substantive decision in favor of the riverfront
5 corridor for the proposed highway. We agree. These proceedings
6 can not affirm or reverse that decision. We would point out,
7 however, that these proceedings can, as justified, affirm or
8 reverse the shoreline permits in question thereby leaving the
9 proposed highway either authorized for development or not.

10 From which the Board makes the following
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26 SHB Nos. 86-34, 86-36 and 86-39
27 ORDER EXCLUDING CERTAIN ISSUES
AND GRANTING PARTIAL SUMMARY
JUDGMENT

ORDER

1. Procedural challenges under SEPA, RCW 43.21C.030 (2)(a) through (h), are barred and therefore the following issues in the Pre-Hearing Order entered on October 27, 1986, are stricken:

a. Issue 1. (a), (b), (c), and (d)

b. Issue 3.

3. Issue 1. (e) except as to any revision of the proposal constituting a "substantial change" under RCW 43.21C.080 and occurring after the Transportation Commission's riverfront corridor decision of August 15, 1985.

2. Partial summary judgment is granted to respondents on Issues 2 and 4.

DONE at Lacey, Washington this 27th day of February, 1987.

SHORELINES HEARINGS BOARD

William A. Harrison

WILLIAM A. HARRISON
Administrative Appeals Judge

SHB Nos. 86-34, 86-36 and 86-39
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AND GRANTING PARTIAL SUMMARY
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